

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

May 8, 2006

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In the Matter of  
Jose Borges, Jr.

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Docket No. 2006-026  
File No. PAN-SE-05-R004-C  
New Bedford

**RECOMMENDED FINAL DECISION**

The petitioner in this matter, Jose Borges, Jr., filed a Notice of Claim for an adjudicatory hearing seeking review of a Notice of Intent to Assess a Civil Administrative Penalty (PAN) issued by the Department's Southeast Regional Office. The Claim was captioned "Motion for Late Filing of Request or Adjudicatory Hearing and for Relief From Civil Assessment," raising the possibility from the start that the Claim was late. As grounds for allowing a late filing, the petitioner's motion explained that although the PAN is dated June 16, 2005, he did not receive the PAN until January 26, 2006, and that the Claim for a hearing was filed within 21 days of that date.

As the PAN was not included with the Claim, I issued an Order to File a More Definite Statement requiring the petitioner to submit a copy of the appealed PAN. The Order also allowed the petitioner and MassDEP to provide evidence and argument on the question of the timeliness of the petitioner's Claim.

The Department moved to dismiss the Claim arguing that it was untimely, based on a date of issuance of the PAN of June 14, 2005.<sup>1</sup> According to the Department, the PAN was sent certified mail return receipt requested. A copy of the “green card” with the signature of Jose Borges, identified as “addressee”, and a delivery date of June 27, 2005 was attached to the Motion. The opposite side of the green card was also copied and submitted and shows the card was returned to the MassDEP Southeast Regional Office on June 28, 2005. There is also a handwritten notation as follows on the card: “PAN SE 05-R004-C EMB/React re” corresponding in part to the file number of the PAN appealed. The Department also submitted information from the Track and Confirm system of the US Postal Service showing notice was left concerning article number 7004 1160 0006 2138 1291 on June 17, 2005 and delivery was made on June 27, 2005.

The petitioner also responded to the Order, provided a copy of the PAN and opposed the Department’s Motion. The PAN bears the date of June 16, 2005 next to the signature of the Regional Director, Gary S. Moran. The petitioner’s response includes the Affidavit of Jose Borges Jr. wherein he states that he did not see the PAN until January 26, 2006 after his attorney received a copy via facsimile from Paul Botelho, a collection agent working for the Department. Mr. Borges’ Affidavit also states that he did not sign the certified mail green card produced by MassDEP as proof of receipt, and he did not authorize anyone to sign his name. The petitioner argues that his Claim for an adjudicatory hearing was received by the Department on February

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<sup>1</sup> Although June 14<sup>th</sup> is cited several times by the Department as the date of issuance in its brief, the PAN is dated June 16<sup>th</sup>. The Department later asserts an issuance date of June 16<sup>th</sup> and I therefore assume that later date as the Department’s position on the date of issuance.

15, 2006 within 21 days of his having first seen the PAN on January 26, 2006, and is therefore timely.

The timeliness of a request for a hearing concerning a PAN is determined from the date of the PAN's issuance and the date the Department receives the Notice of Claim. The date of issuance of a PAN delivered by certified mail is defined in 310 CMR 5.08(2) as the date the document is placed in the mail as evidenced by the postmark. A request for an adjudicatory hearing concerning a PAN must then be **received** by the Department by the twenty-first day after its issuance. 310 CMR 5.35. If a claim is not received by the Department within 21 days of issuance, the person assessed the civil administrative penalty is deemed to have waived the right to request an appeal.

The deadline for filing appeals "is not simply a procedural formality which may be waived by the Department . . ." and failure to comply with the time requirement "is a jurisdictional defect, and requires dismissal of the appeal." Matter of Treasure Island Condominium Association, Docket No. 93-009, Final Decision (May 13, 1993). See also Matter of Sunoco Inc., (R&M), Docket No. 2003-035, Recommended Final Decision (September 16, 2003) adopted by Final Decision (October 1, 2003); Matter of Parks, Docket No. 88-206, Final Decision-Order of Dismissal (April 9, 1991). Failure to file a request for an adjudicatory appeal within the prescribed time period requires dismissal of the claim.

The postmarked envelope bearing the PAN, the best evidence of its issuance date, is not in evidence, as the Department deposited the envelope in the mail and the petitioner asserts he did not receive the mailing. I find the PAN dated June 16, 2005 was mailed by certified mail, return receipt requested. The Department's evidence included the certified mail receipt and

green card with the number of the PAN handwritten on the card addressed to the petitioner. The US Postal Service's track and confirm service shows that notice was left concerning item no. 7004 1160 0006 2138 1291 in New Bedford on June 17, 2005, and was delivered on June 27, 2005.<sup>2</sup> At that time, someone signed the name of Jose Borges on the green card and chose "addressee" as the capacity in which they signed.

As notice was left in New Bedford on June 17, 2005, I find it reasonable to conclude that the PAN, dated the day before, was also properly mailed by certified mail from the MassDEP Southeast Regional Office in Lakeville on that day: June 16, 2005. I conclude that the Department satisfied the service requirements in the civil administrative penalty statute MGL c. 21A, §16 ¶ 3 and regulations at 310 CMR 5.33(3) by sending the PAN by certified mail, return receipt requested, and that the PAN was placed in the mail and issued on June 16, 2005.

There is no disagreement that the petitioner's Claim requesting a hearing was not received by the Department until February 2006, long after the twenty-one day appeal period ended, and after the petitioner received a copy of the PAN from the Department's debt collection agency.<sup>3</sup> Unless the time period for filing a Claim was tolled because the petitioner did not receive notice of the PAN, the Claim is untimely. I now turn to the question of the petitioner's receipt.

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<sup>2</sup> The green card submitted by the Department does not have a tracking number, but the "track and confirm" information also provided by the Department from the US Postal Service website shows both the above mentioned tracking number and the delivery date of June 27, 2005. The green card does note the PAN number (PAN-SE-05-R004-C) of the appealed document and the same delivery date of June 27, 2005 as the U.S. Postal Service track and confirm information.

<sup>3</sup> Debt collection for all agencies of the commonwealth is governed by 815 CMR 9.00, and requires completion of an agency's internal collection efforts, including an initial bill, followed by and four dunning notices before a debt may be assigned to a collection agency. 815 CMR 9.05. The petitioner has provided no information regarding any bill, dunning notice or other notification from this internal collection process.

The civil administrative penalty statute and regulations require service of a Notice of Intent to Assess a Civil Administrative Penalty by hand delivery or by certified mail, return receipt requested. M.G.L. c.21, §16, 310 CMR 5.33(3). They do not require proof of receipt by the addressee, or rely on the date of the PAN's receipt to start the appeal period. Instead, service requires only that the Department mail a PAN by certified mail return receipt requested. Id. The return receipt green card and tracking information in this case provides evidence of mailing to the proper address. And although the identity of the person who actually signed the green card is disputed by the petitioner, personal receipt is not relevant to the calculation of the appeal time period. Matter of The Collings Foundation, Docket No. 2004-047, Recommended Final Decision (April 20, 2004), Adopted by Final Decision (July 6, 2004), Reconsideration Denied (August 31, 2004). (time period for filing an appeal not tolled when properly addressed document returned unclaimed); Matter of Henry Rose, Docket No.s 92-077, 92-172, Final Decision (May 27, 1994) ("the regulations do not include the date of receipt as a factor in determining the twenty-one day appeal period" for a PAN).

A tracking record from the US Postal Service is sufficient to show that the document was properly mailed. There are many reasons an intended recipient of certified mail may not actually receive a document, but the relevant legal requirement under the Department's regulations is that a petitioner file within ten business days of a properly mailed [notice from the Department].

Matter of The Collings Foundation, Docket No. 2004-047, Final Decision (July 6, 2004).<sup>4</sup> The petitioner has made no claim of misdelivery to an incorrect address or ineffective mailing.

Service by use of certified mail has been held to satisfy due process requirements by being

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<sup>4</sup> As the Commissioner noted in Matter of The Collings Foundation, an intended recipient of a mailed article might refuse delivery, be on vacation or overlook the notice. Id. Similarly, the article might be lost or misplaced after receipt.

reasonably calculated to result in actual notice. Town of Andover v. State Financial Services, Inc., 432 Mass. 571, 575, 726 N.E.2d 837 (2000) (notice of foreclosure sent by certified mail return receipt requested is reasonably calculated to provide actual notice.)

Where as under 310 CMR 5.33, service by certified mail is authorized and no proof of service other than the return receipt card is required, a rebuttable presumption of valid service arises with a return receipt for certified mail that is addressed to the party to be served and signed by that party or person who may be served on that party's behalf.

Matter of Capeway Realty Trust, Docket No. 87-44, 87-43, p. 13, Memorandum Decision and Order (March 9, 1988).

The petitioner has not questioned whether the Department mailed the PAN by certified mail return receipt requested or the address to which the PAN was delivered. In this case, certified mail documentation, including the green card bearing a signature evidencing delivery at the petitioner's proper address, establishes that the Department properly served the PAN by mailing it certified mail return receipt requested as required by 310 CMR 5.33. Once properly issued, the petitioner had twenty-one days from issuance to request an adjudicatory hearing. No such Claim was filed within the required time period.

The petitioner acknowledges in his request for a hearing that his claim was late, but asks the Department to allow his claim to go forward. No such discretion is available on the question of whether to accept a late filed appeal, as the deadline for filing appeals is a jurisdictional matter that cannot be waived. Failure to file a request for an adjudicatory appeal within the prescribed time period requires dismissal of the claim. Matter of Treasure Island Condominium Association, Docket No. 93-009, Final Decision 11 MELR 1179 (May 13, 1993).

I find that the Department did not receive petitioner's Claim for an adjudicatory hearing within twenty-one days of the properly mailed and issued PAN, and that as a result the claim is

untimely. I recommend granting the Department's Motion to Dismiss be granted for lack of jurisdiction pursuant to 310 CMR 1.01(5)(a)15.f. v.

### **NOTICE**

This decision is a recommended final decision of the Presiding Officer. It has been transmitted to the Commissioner for his final decision in this matter. This decision is therefore not a final decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's final decision is subject to the rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this recommended final decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion directs otherwise.

This final document copy is being provided to you electronically by the  
Department of Environmental Protection. A signed copy of this document  
is on file at the DEP office listed on the letterhead.

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Ann Lowery  
Presiding Officer

*Adopted by Commissioner Robert W. Golledge, Jr., May 10, 2006.*